(21)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 877

WERT T. REED AND F. F. DOLLERT, *Petitioners,*

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL., *Respondents*

REPLY OF RESPONDENTS,

Houston Oil Company of Texas and Houston Pipe Line Company to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support Thereof

WILLIAM HAMLET BLADES,
Counsel for Respondents,
HOUSTON OIL COMPANY OF TEXAS AND HOUSTON PIPE LINE COMPANY,
Petroleum Building, Houston, Texas

Of Counsel:
SEARS, BLADES, MOORE & KENNERLY,
Petroleum Building, Houston, Texas

ALPHA LAW BRIEF CO., HOUSTON

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents, Houston Oil Company of Texas and Houston Pipe Line Company, respectfully contend and submit that the Writ of Certiorari herein prayed for, the granting of which rests entirely in the discretion of this Honorable Court, there being no Federal question involved, and jurisdiction in the Federal Courts depending solely on diversity of citizen-

ship between Petitioners and Respondents in this suit, should not be granted under the following facts for the following reasons:

Summary Statement of the Matters Involved

Petitioners, Wert T. Reed and F. F. Dollert, two out of some several hundred minority stockholders of Pratt-Hewit Oil Corporation, brought this suit in 1940 against these Respondents, Houston Oil Company of Texas and Houston Pipe Line Company, and others, to cancel a Joint Oil and Gas Operating Contract executed in 1925 by and between Pratt-Hewit Oil Corporation and Houston Oil Company whereby Houston Oil became the Operator with a fractional interest and Pratt-Hewit Oil was the Non-Operator with the remaining fractional interest in certain gas properties on which oil was also developed at a later date, on the alleged ground that Houston Oil fraudulently procured said contract by buying the official discretion of Thos. H. Pratt, Secretary of Pratt-Hewit Oil, by paying to him, individually, alleged excessive considerations in connection with two deals made with him in 1925, one involving the F. B. Rooke 200-acre lease, and the other the Clinton Heard 100-acre lease. Such Petitioners did not allege in their Bill of Complaint (Tr. of Rec. pp. 310 to 351), that said contract was procured through loans from Houston Oil to said Secretary, nor that said contract was void because same unlawfully attempted to delegate the powers and discretion vested in the Directors of Pratt-Hewit Oil to the Directors of Houston Oil, nor that said contract was void because of the usury statutes of Texas and the anti-trust and monopoly laws of Texas, as they later contended in the Circuit Court of Appeals and now contend in their Petition for Writ of Certiorari (Petition for Writ, pp. 2 to 24). These Respondents

in their answer pleaded (1) res judicata on the ground that the same cause of action, between the same parties, based upon alleged fraud in obtaining said contract, and also upon the allegation that the contract was in violation of public policy, the Texas usury statute, and the Texas anti-trust laws had been brought in a State Court in 1927 and had been disposed of by final judgment in 1937 in favor of these Respondents; (2) that Petitioners were estopped to deny such contract because in a final agreed judgment entered in 1938 in still another suit filed in 1933 in a State Court they had recognized such contract; (3) that their alleged cause of action in the present suit was barred by laches, stale demand and the Texas Two and Four Year Statutes of Limitation; and (4) that their allegations of fraud were untrue (R. pp. 351 to 379).

On the trial of the case it was developed that the loans made by Houston Oil Company of Texas to the Secretary of Pratt-Hewit Oil were made and used for the benefit of Pratt-Hewit Oil (R. p. 485); that the deals made by Houston Oil in connection with the Rooke lease and the Heard lease were not fraudulently made and the consideration paid by Houston Oil for an interest in the Rooke lease was not excessive and the contract sought to be canceled was not fraudulently procured by Houston Oil (R. pp. 840 to 843); that in a deposition in a case in the Federal Court in which Pratt-Hewit Oil was a party, the Secretary thereof testified in 1926 that he owned an undivided mineral interest in Refugio County, Texas (Rooke lease), and that he owned an interest in the Heard lease (R. pp. 846 to 859); that the very contract sought to be canceled and which had been recorded in the proper Deed Records in 1926 recited the Secretary's interest in the Heard lease, such ownership of interest being one of the two alleged bases of fraud (R. p. 885); that in 1935 Houston Oil Company recorded in the proper Deed Records an assignment showing every link in the

chain of title on the Rooke lease and the interest of the Secretary of Pratt-Hewit Oil, the other alleged basis of fraud, and that of Houston Oil Company therein (R. pp. 790 and 951); that in a State Court suit in which Pratt-Hewit Oil was a party Houston Oil, in 1936, filed under oath a pleading setting out the instruments through which the Secretary of Pratt-Hewit Oil and Houston Oil held interests in said Rooke lease (R. p. 944); that in 1937 in a State Court a final judgment was entered in a stockholders suit in which the Petitioner, Dollert, Pratt-Hewit Oil, Houston Oil, and others were parties, and which had been pending for ten years, adjudicating that the contract in question and sought to be set aside was not based upon fraud (R. pp. 223 and 358); and in a final agreed judgment entered in 1938 in still another State Court suit filed in 1933, in which Petitioners, Pratt-Hewit Oil, Houston Oil, and others, were parties, Petitioners recognized as valid the Operating Contract (R. pp. 359 and 476).

At the conclusion of the trial of the instant case the Trial Court held in its Findings of Fact and Conclusions of Law (R. pp. 507 to 520) that there was no fraud in connection with the procurement of the contract sought to be canceled, that the loans made to the Secretary of Pratt-Hewit Oil were used for that corporation's benefit, and that the alleged cause of action was barred by res judicata, and that such cause of action, if any, was barred by laches, stale demand, and the Texas Statutes of Limitation; and upon such Findings of Fact and Conclusions of Law the Trial Court entered its final judgment on the merits of the case that the Petitioners herein "take and recover nothing of and from" the Respondents herein (R. p. 504).

The United States Circuit Court of Appeals, Fifth Circuit, affirmed the judgment of the Trial Court, and in so doing held:

"It is claimed by appellants that the contract and leases were secured by fraud, part of which consisted in bribing a corporate officer. Many issues were presented and many defenses raised in the court below, but appellees' real defense was that there was no fraud. No good could result either from restating the pleadings or reviewing the evidence in this case. The findings and conclusions of the District Court are free from error, and the judgment appealed from is

Affirmed." (R. p. 1041 and REED v. HOUSTON OIL Co., 132 Fed. (2d) 748.)

REASONS WRIT OF CERTIORARI SHOULD NOT BE GRANTED

First

Because there are concurrent findings of fact of the District Court and the Circuit Court of Appeals, which findings have not been shown to be plainly erroneous or unsupported by the evidence, but which are amply supported by the record in the case, since the Trial Court, after the waiving of a jury by the parties, and after hearing and considering the testimony and evidence, found the facts in favor of the defendants and against the plaintiffs, Petitioners herein, and the Appellate Court on reviewing the case held that "the *findings* and conclusions of the District Court are free from error." (R. pp. 504, 507 and 1041; 132 Fed. (2d) 748.)

Second

Because neither a District Court nor the Circuit Court of Appeals in deciding this case have rendered decisions affecting in any way any Federal question, since none was involved. (R. pp. 504, 507 and 1041).

Third

Because the Circuit Court of Appeals in deciding this case has not rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, since in its opinion it recites "Many issues were presented and many defenses raised in the court below, but Appellees' real defense was that there was no fraud * * *. The *findings* and conclusions of the District Court are free from error * * * ", thus showing that, aside from conclusions of law which the Trial Court found against Petitioners and which the Appellate Court found free from error, on the merits the facts were against the Petitioners, thus making it unnecessary for the Appellate Court to cite a single decision of any court, State or Federal. (R. p. 1041).

Fourth

Because the Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with applicable decisions, since the Circuit Court of Appeals' affirmation of the Trial Court's findings and its judgment can be amply supported by the findings of fact on the merits against Petitioners and on the findings of fact and of law on the defenses of res adjudicata, estoppel, laches, stale demand, and the Texas Two and Four Year Statutes of Limitation, and since there is not a single proposition of law announced in the opinion of the Circuit Court of Appeals in conflict with applicable local decisions on important questions of local law. (R. p. 1041).

Fifth

Because the Trial Court made no finding contrary

to local decisions on Texas usury, monoply, and anti-trust laws, and because the Circuit Court of Appeals in affirming the Trial Court's findings and judgment did not, as a matter of fact, pronounce a single proposition of law in conflict with local decisions on such local laws, and because, as a matter of fact, such local laws are not applicable to the case and if they were, they were not pleaded in the instant case though they were later argued by Petitioners, and because such local laws were pleaded and relied upon in the former stockholders suit in the State Court where judgment was adverse to the contentions of the Petitioners and is binding herein as res adjudicata. (R. pp. 504, 507 and 1041).

Sixth

Because the Circuit Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, and has not so far sanctioned such a departure by a lower court, since no departure was made, as to call for an exercise of the Supreme Court's power of supervision, and because there are no special and important reasons stated by the Petitioners, nor in the record, why a Petition for Writ of Certiorari should be granted. (R. p. 1041).

Brief in Support of Reply

In our Reply we have called the Court's attention to the fact that there is no Federal question in this case. In the absence of such a question the Petitioners have no right to a direct appeal from the Circuit Court of Appeals for the Fifth Circuit to this Honorable Court. Federal jurisdiction was sought and had on the ground of diversity of citizenship only. Under the facts in the instant case Petitioners must

depend upon the discretion of this Court to secure its jurisdiction since they are not entitled to invoke the jurisdiction of this Court as a matter of right. Petitioners, therefore, seek to get before this Court under Sec. 240 of the JUDICIAL CODE, 28 U.S.C.A. 347, and SUPREME COURT RULE 38.

Petitioners in their Bill of Complaint alleged that Houston Oil acquired the contract sought to be cancelled by purchasing the official discretion of the Secretary of Pratt-Hewit Oil by fraudulently making a deal with him on the Clinton Heard lease prior to said contract and by fraudulently making a deal with him on the F. B. Rooke lease subsequent to said contract. The Trial Court held that there was no fraud in these matters and in obtaining such contract, thereby in effect holding that the Heard lease deal had nothing to do with obtaining the contract, and the contract itself disclosed that the Heard lease deal had been made and that the Rooke lease deal had nothing to do with obtaining said contract. Petitioners in their Complaint alleged nothing about loans made by Houston Oil to the Secretary of Pratt-Hewit Oil, but on their appeal claimed that this was fraud in securing said contract. The evidence was that the loan was made to secure pipe for Pratt-Hewit Oil and that it and not the Secretary reaped the benefit. The Trial Court held that there was no fraud in this connection and in effect had nothing to do with obtaining said contract. Petitioners in their Complaint alleged nothing about the contract being in violation of the Texas Statutes and laws on anti-trust, monopoly and usury, but on their appeal claimed that the contract was void for such alleged violations. We submit that if there be in the contract in question a violation of the anti-trust and monopoly laws, which these Respondents deny, the Attorney General of Texas, and not the Petitioners herein, would be the proper party to raise such issues.

We further submit that, when two corporations make a

Joint Operating Contract on certain mineral lands, this does not create a monopoly, and further that when one is designated the Operator and the other the Non-Operator thereunder that this does not create a trust and that merely because the Operator has the discretion as to operations of the leases that such power does not give such Operator the control of the Non-Operator's corporate affairs nor is it a delegation of corporate affairs by the Non-Operator to the Operator, since each corporation still administers its own internal and corporate affairs, the Operator corporation merely paying to the Non-Operator corporation its portion of the profits under such contract and it in turn making its own use and distribution of such profits and being free to operate any other leases as it sees fit. In Texas a corporation may "sell, mortgage or otherwise convey" any or all of its property. R. S. 1925, ART. 1320, SUBD. 4. It may likewise lease all or a part of its properties without abandoning its object or terminating its corporate powers. STARKE v. GUFFEY PETROLEUM, 98 Tex. 542.

We also submit that such contract was not usurious. If it were, the injured party would have two years to bring suit for recovery of double the interest paid and nothing more. Under its terms the Operator advanced large sums to Non-Operator to pay off its debts with interest at six per cent per annum, whereas, the maximum interest rate under the Texas law was ten per cent per annum, and advanced large sums to develop the properties, one-half to be borne by each party, and donated its skill and experience and ran the risk of not only not getting any interest on its money, but of losing all the principal if sufficient production was not had, and as a matter of fact the Operator spent hundreds of thousands of dollars over a period of several years before it ever made a dollar profit and then only because of a fortunate discovery of oil in addition to the previous discovery of gas, all of which then made a solvent corporation of Pratt-Hewit Oil, whereas,

it had been an insolvent corporation at the time of the making of such contract. TEXAS REVISED CIVIL STATUTES OF 1925, Articles 5069, 5071 and 5073. Usury cannot be predicated upon a transaction whereby repayment of any amount under the contract rests upon a contingency of production of minerals, or upon a joint venture in which the parties pool their resources with the expectation of making a profit. PANSY OIL CO. v. FEDERAL OIL CO. (T.C.A.), 91 S.W. (2d) 453; BURTON v. STEYNER (T.C.A.), 182 S.W. 394.

The Trial Court has held that on the facts and on the merits Petitioners had no cause of action, but that nevertheless in the former stockholders suit in the State Court all issues of fraud, anti-trust, monopoly and usury had been decided against their contention and in favor of Houston Oil (R. p. 513), and such was res adjudicata and, furthermore, that any such cause of action, if any, was barred by laches, stale demand and the Texas Two and Four Year Statutes of Limitation, since one of the alleged acts of fraud, the Heard lease deal, was disclosed in the said contract of 1925 which went of record shortly after its making about fifteen years before the filing of the present suit, and since the other alleged act of fraud, the Rooke lease deal, was disclosed in a deposition in a Federal Court suit in 1926 in which Pratt-Hewit Oil was a party and such deal was spread of record in 1935 on the Deed Records, and in 1936 was fully disclosed in another State Court suit (R. pp. 514-519). Texas Two and Four Year Statutes of Limitation, TEXAS REVISED CIVIL STATUTES OF 1925, Arts. 1926, 1927 and 1929; EVANS v. SOUTHERN METHODIST UNIVERSITY, 87 S.W. (2d) 918, 131 Texas 333, 115 S.W. (2d) 622.

The contract in question was involved in a State Court stockholders suit in which one of your Petitioners, Dollert, Pratt-Hewit Oil, and Houston Oil were formal parties and which was brought as a class suit for the benefit of all stock-

holders of Pratt-Hewit Oil and in which the issue of fraud, anti-trust, monopoly and usury were involved and decided adversely to Pratt-Hewit Oil and its stockholders after pending in the trial and appellate courts of Texas from 1927 to 1937, which decision was pleaded in the instant case as res adjudicata. HARTFORD LIFE INS. CO. v. IBS, 237 U.S. 662, 59 L. Ed. 1165; ASHWANDER v. TENNESSEE VALLEY AUTHORITY, 297 U.S. 288, 80 L. Ed. 688.

The Contract in question was recognized in another State Court suit in which both of your Petitioners, Reed and Dollert, Pratt-Hewit Oil, and Houston Oil were formal parties and which suit was pending in the trial court from 1933 to 1938, which recognition was pleaded in the instant case as estoppel. 21 CORPUS JURIS 1228, Sec. 232; DAVIS v. WAKELEE, 156 U.S. 680, 39 L. Ed. 578.

The alleged acts of fraud, the Rooke lease deal and the Heard lease deal, which were alleged in the instant case to have procured the contract in question, were fully disclosed by deposition of the Secretary of Pratt-Hewit in 1926 in a Federal Court suit in which Pratt-Hewit Oil was a formal party.

The alleged act of fraud, the Rooke lease deal, which was alleged in the instant case to have been one of the two procuring causes of the contract in question, was fully disclosed in still another State Court suit in which Pratt-Hewit Oil was a formal party by a verified pleading of Houston Oil Company filed in 1936 in the suit.

Only findings of fact and conclusions of law and final judgment and not an opinion were filed in the Trial Court in the instant case, thus the case in the Trial Court is unreported and does not appear in FEDERAL SUPPLEMENT REPORTER. In the opinion in the Circuit Court of Appeals, reported 132 Fed. (2d) 748, the judgment of the Trial Court is affirmed by the Court saying that while there were many

issues raised by plaintiffs and many defenses presented by defendants in the court below "the findings and conclusions of the District Court are free from error" and without the Circuit Court of Appeals pronouncing one proposition of law or citing one case. Therefore, the decision of the Circuit Court of Appeals merely decides that the correct result was reached by the Trial Court as between the parties, and such opinion could not and does not conflict with any State or Federal decision. Therefore, we fail to see any "special and important reasons" or any questions of sufficient national or local importance why a review on Writ of Certiorari should be granted. Certainly the Circuit Court of Appeals has not decided any Federal question and has not rendered a decision in conflict with the decision of another Circuit Court of Appeals, and has not decided an important question of local law in conflict with applicable local decisions and has not departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by a lower court so as to call for an exercise of the Supreme Court's power of supervision. Since the District Court and Circuit Court of Appeals have found the facts the same way, we submit that it is not incumbent on the Supreme Court to review the evidence and facts. PAGE v. ARKANSAS NATURAL GAS CORP., 286 U.S. 269 (271), 76 L. Ed. 1096 (1098). "The denial of a writ of certiorari imports no expression of opinion (by the Supreme Court) on the merits of the case." ATLANTIC COAST LINE R. CO. v. PANE, 283 U.S. 401 (403), 75 L. Ed. 1142 (1143).

We therefore submit in the words of the Trial Court in his findings "There should be an end to litigation of this type, especially where there have been so many suits already involving this Company (Pratt-Hewit Oil), one of which was a shareholders' suit."

WHEREFORE, these Respondents respectfully pray that

the Writ of Certiorari prayed for herein be in all things denied and refused.

Respectfully submitted,

WILLIAM HAMLET BLADES,
Counsel for Respondents,
HOUSTON OIL COMPANY OF TEXAS
AND HOUSTON PIPE LINE COMPANY,
Petroleum Building, Houston, Texas

Of Counsel:
SEARS, BLADES, MOORE & KENNERLY,
Petroleum Building, Houston, Texas

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